IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2521 OF 2005

M/s. Defiance Knitting Industries Private Limited ...Petitioner

Versus

M/s. Jay Arts ...Respondent

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Mr. A.Y. Sakhare, Senior counsel with Mr. K.J. Hakani, counsel for Petitioner

Mr. Jokhim Rais with Mr. Niranjan Pandit with Mr. Hemant Seth counsel for Respondent.

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CORAM: B. H. MARLAPALLE, J.

DATED: 20TH APRIL, 2005

P. C.:-

1. Heard Mr. Sakhare, the learned senior counsel with Mr. Hakani, the learned counsel, for the petitioner and Mr. Rais, the learned counsel for the respondent.

2. Summary Suit No. 10 of 2001 has been filed by the respondent before the learned C.J.S.D. at Kalyan for recovery of an mount of Rs.98,81,426.63. In addition, the plaintiff has claimed interest from the date of filing of the suit till the realisation of the amount. The suit was filed on or about 5.7.2001. After issuing notice, the petitioner defendant filed an application under Order XXXVII Rule 3(5) of C.P.C.

for leave to defend unconditionally and the said application was rejected by the trial Court. The petitioner, therefore, approached this Court in Civil Revision Application No.659 of 2002 and in terms of the consent orders, it was disposed of on 2.5.2002. The said order does show that the petitioner was to deposit an amount of Rs.20,00,000/- with the trial Court within four months to show his bonafides and was entitled to take out an application for leave to defend which was required to be heard on merits. If he succeeded in his application for leave to defend, he was allowed to withdraw the amount deposited. The trial Court heard the parties afresh and by the impugned order dated 11.3.2005, the application at Exh.34 has been allowed on the condition that the petitioner to deposit an additional amount of Rs.50,00,000/- in two instalments.

3. Mr. Sakhare, the learned senior counsel by referring to the numerous correspondence between the parties right from 5.11.1997 onwards, submitted that the summary suit raised several disputed questions which needed trial and at no point of time, the petitioner had accepted the claim made by the plaintiff. It was also pointed out that the petitioner had taken up the issue with its Architect and all the bills submitted by the plaintiff were returned to the Architect. Thus, the petitioner had

not accepted the payments as claimed by the plaintiff. It was further submitted that the trial Court failed to give proper reasonings and a cryptic order has been passed rejecting the application for leave to defend unconditionally. Mr. Sakhare placed reliance on the decision in the case of **M/s. Mechalec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation (AIR 1977 SC 577) and Mrs. Raj Duggal Vs. Ramesh Kumar Bansal (AIR 1990 SC 2218).**

4. After issuing notice in the trial Court, yet the defendant has not filed its written statement. The application filed at Exh.34, the defendant has disputed the contents and in fact denied the claim made by the plaintiff. However, the plaintiff has set out its case to point out that the work as per the tender was completed some times in March, 1999, the final bills submitted by it were certified by the Architect of the defendant and certificate to that effect was issued on 19.4.1999. The Architect had forwarded the bills to the defendant for clearance and the final bill amount was Rs.2,07,11,475/-, out of which, an amount of Rs.1,08,29,989/- was received. The correspondence brought on record shows that the meeting was held between the parties and the issue regarding incomplete work, payments and final settlement were discussed by them in the meeting. This is clear from the letter addressed by the

present petitioner dated 20.11.1998 to its Architect Mr. Qutub Mandviwala. It was agreed that Mr. S. Vora would be available between 10th December and 2nd January for final discussion and settlement of the dues. During this period, the Contractor and the Architect should discuss and settle all the payments etc. after completing the jobs as agreed. The correspondence thereafter, between the petitioner and its Architect goes to show that there were some defective jobs which were to be completed. However, the fact remains that the final bills submitted by the plaintiff were certified on 19.4.1999 by the Architect of the defendant and thereafter, vide letter dated 27.4.1999, the defendant took up the issue with its Architect. All this correspondence goes to show that the claim made by the plaintiff is not totally denied and there may be some subtractions in terms of the interest or defective work but there is nothing on record to show that the Architect of the petitioner company has finally worked out the figure, quantified the payment to be made to the plaintiff and in any case less than the amount certified by the said Architect on 19.4.1999.

5. Though the trial Court ought to have given proper reasons in support of the impugned order, the correspondence between the parties does show that the application submitted by the petitioner could not be

allowed and the discretion exercised by the trial Court granting leave to defend conditionally i.e. on total deposit of Rs.70,00,000/- cannot be termed to be perverse or patently erroneous. About four years have already gone from filing of the claim before the trial Court and the original claim is of Rs.98,81,426.63. The principles set out in the case of M/s. Mechalec Engineers & Manufacturers (supra), are as under;-

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend. that is to say, although the affidavit does not positively and immediately make it

clear that he has a defence, yet, shews such a facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory, or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and given leave to the defendant on such condition and thereby show mercy to the

defendant by enabling him to try to prove a defence. (1945) 49 Cal WN 246, Rel. on (para.8)

6. If regards be had to these principles set out by the Apex Court, it cannot be said that the petitioner made out a case for leave to defend unconditionally.

7. Hence, this petition must fail at the threshold and the same is hereby rejected summarily. However, time to deposit the first instalment is extended by four weeks from today and second instalment will be deposited within a period of four weeks thereafter. This concession is granted on the basis of oral application made by the learned senior counsel Mr. Sakhare and without prejudice to the rights of the defendant.

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